TSC EDUCATION SDN BHD

v.

KOLEJ YAYASAN PELAJARAN MARA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-230-2001]
16 APRIL 2002

CONTRACT: *Void contract - Non-legal entity - Entered into agreement to recruit students from China to pursue courses and programmes therein - Whether in contravention of law - Whether empowered only to facilitate Bumiputeras - Whether agreement ultra vires and void - Whether court can compel performance of agreement for breach of an obligation - Specific Relief Act 1950, s. 53 - Majlis Amanah Rakyat Act 1966, ss. 6, 25, sch IV- Majlis Amanah Rakyat (Yayasan Pelajaran MARA) Order 1969, r. 2*

CONTRACT: *Illegality - Contravention of law - Defendant entered into agreement with plaintiff to recruit students from China to pursue courses and programmes with defendant - Capacity of defendant to enter into agreement - Non-legal entity - Empowered only to facilitate Bumiputeras - Whether agreement ultra vires and void - Whether court can compel performance of agreement for breach of an obligation - Specific Relief Act 1950, s. 53 - Majlis Amanah Rakyat Act 1966, ss. 6, 25, sch IV- Majlis Amanah Rakyat (Yayasan Pelajaran MARA) Order 1969, r. 2*

The plaintiff and the first defendant entered into an agreement ('the agreement') wherein the plaintiff was appointed by the first defendant as independent advisers to recruit students from China to pursue courses and programmes with the first defendant. The plaintiff successfully recruited the first batch of students. Subsequently, the plaintiff was requested to stop taking the second batch of students which were already scheduled to arrive in the country. Further, the plaintiff was requested to transfer the first batch of students currently with the first defendant to other colleges. The plaintiff now applied to the court, *inter alia*, to compel the first defendant to comply with the terms of the agreement. The second defendant was subsequently added as a party.

Held:

[1] The second defendant was a corporation established under the Majlis Amanah Rakyat Act 1966 ('the Act') and pursuant to the Majlis Amanah Rakyat (Yayasan Pelajaran MARA) Order 1969 ('the Order'). Under r. 2 of the Order, the creation of the second defendant was confined to the provisions relating to the training and educational facilities of Bumiputeras

a only. It did not empower the second defendant to provide training and educational facilities to non-Bumiputeras. The students from China would be out of range of r. 2 of the Order. The clear cut parameter as set out in r. 2 of the Order could not be waived and the second defendant was bound to adhere to it. (pp 592 c & 594 a-b)

b **[2]** The powers of a statutory corporation come from the statute that created it. Independent of the statute, the statutory corporation has no inherent or implied powers. Thus, if a statutory corporation enters into any contract which is not authorised by the statute creating it, then that contract will be *ultra vires* and *void ab initio*. (p 597 g)

c **[3]** The first defendant was not a legal entity created by statute. The agreement between the plaintiff and the first defendant had nothing to do with the second defendant. The plaintiff could not rely on the agreement which it had entered with the first defendant to bind the second defendant. That would go against the doctrine of privity of contract. If the agreement d was capable of binding the second defendant, the latter's power to enter into the agreement was "circumscribed by the object" of "its incorporation" under r. 2 of the Order. Any exercise of power beyond the scope of the express powers in the Order must be construed as *ultra vires* the powers of the second defendant and therefore *void ab initio*. (pp 597 h-i & 598 a, c)

e **[4]** The agreement could not give the first defendant the authority to do an act which was clearly not provided for in the Order. The agreement, in its entirety, was in direct conflict with the provisions of the Order and the agreement could not be made right by merely adding cl. 5.1.5 in an f attempt to give the first defendant the power to do an act which was prohibited in law. The agreement could not override nor take precedence over the provisions of the law. (p 598 e-f)

[5] The Act and the Order did not contain provisions to allow the entry of students from China into the first defendant. They were enacted for the g advancement of Bumiputera students. Had the legislators intended to include non-Bumiputera students, be it local or foreign, it would have made provisions to that effect. The language of the Act and the Order are clear and unambiguous and the question of interpretation has no role to play at all. (p 598 h-i & 604 g)

h **[6]** Each party must plead all the material facts which that party proposes to rely upon otherwise that party will be barred from adducing any evidence of them in the course of the trial. The issue of the first defendant operating under the approval of the Ministry of Education was never raised by the i plaintiff in its statement of claim nor in its affidavits. The plaintiff was, therefore, barred from raising that issue. (p 606 a-b)

[7] The question as to whether the defendants should be compelled to carry on with the agreement under s. 56 of the Specific Relief Act 1950 did not arise at all as the agreement was not valid in the first place being contrary to the Act and the Order. (p 607 i & 608 a-b)

[Application dismissed.]

Case(s) referred to:

A-G v. Albany Hotel Company [1896] 2 Ch 696 ***(refd)***
A-G v. Corporation of Leicester [1910] 2 Ch 359 ***(refd)***
A-G v. Great Northern Railway Co [1909] 1 Ch 775 ***(foll)***
A-G v. Smethwick Co [1932] vol 1-2 Ch 562 ***(foll)***
Amalgamated Society of Railway Servants v. Osborne [1910] AC 87 ***(foll)***
American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***
American Express Sdn Bhd v. Dato' Wong Kee Tat & Ors [1990] 1 CLJ 17; [1990] 1 CLJ (Rep) 1 ***(dist)***
Archbolds (Freightage) Ltd v. S Spanglett Ltd (Randall 3rd Party) [1961] 1 All ER 417 ***(dist)***
Arab Malaysian Finance Bhd v. Meridien International Credit Corporation Ltd London [1993] 4 CLJ 307 ***(dist)***
Armour v. Liverpool Corporation [1939] Ch 422 ***(refd)***
Associated Tractors Sdn Bhd v. Chan Boon Heng & Anor [1990] 2 CLJ 157; [1990] 1 CLJ (Rep) 30 ***(refd)***
Banque Nasionale De Paris v. Wuan Swee May & Anor [2000] 4 CLJ 387 ***(refd)***
Capper & Anor v. Baldwin [1965] 2 QB 53 ***(refd)***
Cartledge & Ors v. E Jopling & Sons Ltd [1963] AC 758 ***(refd)***
Charles Roberts & Co Ltd v. British Railways Board [1964] 3 All ER 651 ***(foll)***
Chase Manhattan Bank NA v. Mercantile Co-operative Thrift & Loan Society Ltd [1992] 2 MLJ 168 ***(refd)***
Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386 ***(refd)***
Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 ***(refd)***
Coats v. Herefordshire County Council [1909] 2 Ch 579 ***(foll)***
Colman, on Behalf, & C v. Eastern Counties Railway Co [1846] 10 Beav 1 ***(refd)***
Coxe And Phillips, 95 Eng Rep 152 (KB 1736) ***(refd)***
Deuchar v. Gas Light and Coke Co [1925] AC 691 ***(refd)***
EEOC v. Boeing Co, 109 FRD 6, 9-11 (WD Wash 1985) ***(refd)***
EEOC v. Pan Am World Airways, 52 Fair Empl Prac Cas (BNA) 926 (ND Cal 1987) ***(refd)***
Elizabeth Dowager Baroness Wenlock & Ors v. The River Dee Co [1884-85] 10 App Cas 354
Foo Kee Boo & Anor v. Ho Lee Investment (Pte) Ltd [1988] 3 MLJ 128 ***(dist)***
Hadmor Productions Ltd & Ors v. Hamilton & Anor [1983] 1 AC 191 ***(refd)***
Hare v. London and North-Western Railway Co [1861] 2 J & H 78 ***(foll)***
Ho Shee Jan v. Stephens Properties Sdn Bhd [1986] 2 MLJ 43 ***(refd)***
Hoptowit v. Ray, 682 F 2 d 1237 (9th Cir 1982) ***(refd)***
Hughes & Ors v. Asset Managers plc [1995] 3 All ER 669 ***(dist)***
In re Estelle, 516 F 2 d 480 (5th Cir 1975) ***(refd)***

In re The Joint Application of The Great Northern Railway Co and The Great Central Railway Co [1908] 24 TLR 417 ***(foll)***

Kepong Prospecting Ltd v. AE Schmidt [1968] AC 810 ***(refd)***

League of Women Voters v. FCC, 489 F Supp 517 (CD Cal 1980) ***(refd)***

London County Council v. The Attorney-General & Ors [1902] AC 165 ***(refd)***

Magor & St Mellons Rural District Council v. Newport Corporation [1952] AC 189 ***(refd)***

Malaya Borneo Building Society Ltd v. M Ramachandran [1959] 25 MLJ 182 ***(refd)***

Malaysia Shipyard and Engineering Sdn Bhd v. Bank Kerjasama Rakyat Malaysia Bhd [1985] 2 MLJ 359 ***(foll)***

MBf Holdings Bhd v. East Asiatic Co (Malaysia) Bhd [1995] 4 CLJ 73 ***(refd)***

Miller v. Salomons [1852] 7 Ex 475 ***(refd)***

National Union of Teachers in Independent Schools, West Malaysia v. Han Chiang High School, Penang [1989] 1 CLJ 1091; [1989] 2 CLJ (Rep) 160 ***(refd)***

Philipps v. Philipps & Ors [1878-79] 4 QBD 127 ***(refd)***

Phoenix General Insurance Co of Greece SA v. Administratia Asigurarilor de Stat [1987] 2 All ER 152 ***(dist)***

Re The British Farmers Pure Linseed Oil Cake Company (Ltd); Nicholls' Case [1878] 47 LJ Ch 415 ***(refd)***

S Pearson & Son Ltd v. Dublin and South Eastern Railway Co [1909] AC 217 ***(refd)***

Shamsudin Shaik Jamaludin v. Kenwood Electronic Technologies (M) Sdn Bhd (formerly known as Trio-Kenwood Electronics Engineering (M) Sdn Bhd [1999] 8 CLJ 544 ***(refd)***

Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 ***(refd)***

Sutters v. Briggs [1922] 1 AC 1 ***(refd)***

Syed Aman Syed Hassan v. MARA Institute of Technology [1993] 1 CLJ 228 ***(refd)***

The Attorney-General & Ephraim Hutchings (Relator) v. The Directors & C, of The Great Eastern Railway Company [1879-80] 5 App Cas 473 ***(refd)***

The Company of Proprietors of The Rochdale Canal v. Radcliffe [1852] 18 QB 287 ***(foll)***

The Directors, & C of The Ashbury Railway Carriage and Iron Co (Ltd) v. Hector Riche [1874-75] 7 LR HL 653 ***(refd)***

The Directors, & C of The Eastern Counties Railway Co v. Henry Hawkes [1855] 5 HL Cas 331 ***(foll)***

The King v. The Inhabitants of Banbury [1834] 1 AD & E 136 ***(refd)***

The National Guaranteed Manure Co (Ltd) v. Donald & Anor [1859] 4 H & N 8 ***(foll)***

The South Yorkhire Railway and River Dun Co v. The Great Northern Railway Co [1853] 9 Exch 53 ***(refd)***

The Trowbridge Water Co v. Wilts County Council [1909] 1 KB 824 ***(refd)***

Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd [1987] 1 CLJ 474; [1987] CLJ (Rep) 396 ***(refd)***

Trustees of The Harbour of Dundee v. D & J Nicol & Ors [1915] AC 550 ***(refd)***

Tweddle v. Atkinson [1861] IB & S 393 ***(refd)***

United States v. Michigan 116 FRD 655 (WD Mich 1987) ***(refd)***

Vita Food Products Inc v. Unus Shipping Co Ltd (In liquidation) [1939] 1 All ER 513 ***(dist)***

Wimbledon and Putney Commons Conservators v. Tuely [1931] 1-2 Ch 190 ***(refd)***

Yukilon Manufacturing Sdn Bhd v. Dato' Wong Gek Meng & Ors (No 4) [1998] 4 CLJ Supp 319 ***(refd)***

Legislation referred to:
Co-operative Societies Act 1948, s. 32
Federal Constitution, art. 153
Institut Teknologi MARA Act 1976, s. 4A(1)(a)
Majlis Amanah Rakyat Act 1966, ss. 1, 6(1), (2), 7, 25
Majlis Amanah Rakyat (Yayasan Pelajaran MARA) Order 1969, r. 2
Reciprocal Enforcement of Judgments Act 1958, s. 5
Specific Relief Act 1950, s. 53

Other source(s) referred to:
Andrew Harding, *Law, Government and the Constitution in Malaysia*, pp 233, 234
LA Sheridan & Harry E Groves, *The Constitution of Malaysia*, p 213
Tun Mohamed Suffian Hashim, *An Introduction To The Constitution of Malaysia*, 2nd edn, p 321

For the plaintiff - Gideon Tan (Chin Yin Choi); M/s Gideon Tan Razali Zaini
For the 1st defendant - Oommen Koshy as an amicus curiae
For the 2nd defendant - Oommen Koshy (Lucy Tan Leong Loo); M/s Mohamed Ismail & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Brief Background

The writ of summons with the statement of claim in enclosure one (1) cited only the first defendant as the sole defendant. By way of encl. 4, the plaintiff sought to apply, on an *ex parte* basis, against the first defendant for the following orders:

a) the first Defendant be ordered to comply with the terms as stated in the agreement between the Plaintiff and the first Defendant dated 22/12/1999 ("the said agreement"), *inter alia*, but not restricted to,

(i) the first Defendant continues to offer and maintain the courses thereat so as to enable the students from the People's Republic of China to complete the courses at the first Defendant's premises and graduate upon completion; and

(ii) the first Defendant shall ensure that there be provided proper academic support by the relevant faculty and academic staff and departments concerned and also adequate facilities for the students from the People's Republic of China, which include intensive seminars, synchronous or asynchronous tutorials, assignments marking, setting of examinations and marking of papers, invigilation or proctoring of examinations and examination rooms;

(b) the first Defendant be ordered to admit and register 7 students from the People's Republic of China for the March/April 2001 session whose arrival date was fixed on 14/5/2001 and the following is a list of the names of the students concerned ("group one of the China students") who was given offer letters by the first Defendant to further their studies with the first Defendant:

(i) Shi Xueping (f);

(ii) Li Juan (f);

(iii) Huang Pei (f);

(iv) Ge Min (f);

(v) Gu Ying (f);

(vi) Wang Zhi (f); and

(vii) Liu Zhenyi.

(c) the first Defendant is to be further ordered to admit and register the students from the People's Republic of China for the June and September 2001 session ('group two of the China students') pursuant to the terms of the said agreement;

(d) the first Defendant is to be ordered to make an application for visas and any other approvals required for the China students concerned immediately for the purposes of complying with the date of arrival that has been fixed on 14/5/2001 and/or at any earliest date possible or as soon as possible if it exceeded the date on 14/5/2001;

(e) the first Defendant is further to be ordered to make an application for visas and any approvals that are required for the group two of the China students concerned immediately for the purposes of complying with the arrival date that has been scheduled;

(f) the first Defendant is ordered to issue invoices concerned for the first year of the course as stated in Schedule "A" of the said agreement – ACCA-China, Student's Schedule of Payment, that ought to be paid on 12/4/2001, to the parents of the first group of the China students who are now studying with the first Defendant after being admitted on October/November 2000;

(g) costs in the cause; and

(h) any further order or relief that is deemed fit by this Honourable Court.

And the reasons for the application in encl. 4 were said to be:

a) the first Defendant had breached the agreement dated 22/12/1999 between the Plaintiff and the first Defendant and the first Defendant had failed and refused to get the approvals for visas and the approvals required by the China students to further their studies in Malaysia;

b) the actions of the first Defendant in refusing to enrol the China students have caused bad publicity to Malaysia and is against the policy of Malaysia to encourage international students to further their studies in Malaysia; and

c) the China students concerned suffer hardship as they have resigned from their jobs and are not able to further their studies in Malaysia now and the balance of convenience lies in favour of the first Defendant who have the capacity to enrol the China students to enable them to further their studies here in Malaysia.

I have purposely described the first defendant as the sole defendant and there was a reason for this. When encl. 4 came up for hearing before me, for the very first time, Mr. Gideon Tan assisted by Miss Chin Yin Choi appeared for the plaintiff while Mr. Oommen Koshy appeared as *amicus curiae* (literally, a friend of the court). It was the stand of Mr. Oommen Koshy that he could not act for the first defendant because, according to him, the first defendant was not a legal entity and thus an appearance could not be entered for the first defendant.

In America, the *amicus curiae* status has surpassed the traditional bounds of its common law ancestor. In its litigating form, the *amicus* has transcended its normal role of briefing the court. Some federal district courts in America have been very bold and have permitted the *amicus* to engage actively in oral argument, to introduce physical evidence, to examine witnesses, to conduct discovery, and even to enforce previous court decisions upon the participants to the litigation (see for examples, *Hoptowit v. Ray*, 682 F. 2 d 1237, 1260 (9th Cir. 1982) (upholding *amicus* involvement in discovery and party-like participation at trial); *In re Estelle,* 516. F. 2 d 480, 483 (5th Cir. 1975) (permitting United States as *amicus curiae* to employ full range of powers of party); *EEOC v. Pan Am. World Airways*, 52 Fair Empl. Prac. Cas. (BNA) 926, 931 (ND Cal. 1987) (allowing *amicus curiae* ability to participate in all depositions, file briefs, and participate in a trial in an unspecified manner); *United States v. Michigan*, 116 FRD 655, 664 (WD Mich. 1987) (allowing *amicus curiae* to present evidence at trial, enforce consent decree, and engage in an oral argument); and *EEOC v. Boeing Co.*, 109 FRD 6, 9-11 (W.D. Wash. 1985) (creating hybrid *amicus* status with ability to participate as counsel at the trial and also engage in discovery with EEOC)).

It is interesting to note that the history of the *amicus* device is very chequered. It dates back to the Roman law. It hinges on one single principle, namely, flexibility. In the case of *League of Women Voters v. FCC*, 489 F. Supp. 517, 518 (CD Cal. 1980), the court held that the role of *amicus* is flexible and can be moulded by the courts to surmount exigencies of the particular action. Under the Roman law, the *amicus*, at the court's discretion, would provide information on areas of law beyond the expertise of the court. It is from this practice that the English common law concept of an *amicus* develops where the *amicus* as a disinterested bystander would, at the court's request or permission, inform the court on points of law. The first reported case where the court allowed an *amicus curiae* to participate in a trial solely to protect third party interests was in 1736 in the case of *Coxe And Phillips*, 95 Eng. Rep. 152 (KB 1736). In *Coxe v. Phillips (supra)*, the court allowed the *amicus* to inform the court that the suit between the parties was collusive in nature that was ultimately designed to attack the marital status of the *amicus*. As I see it, *Coxe* enabled the *amicus curiae* to serve two masters: the court and the *amicus's* own interests. So much for the brief digression. Now, it is time to return to the present case at hand.

In due course, there was a formal application to add Yayasan Pelajaran MARA as the second defendant and the learned deputy registrar allowed the said application.

When all the parties were rightly before the court, encl. 15 which was an amended summons in chambers and which sought for the same prayers as encl. 4 came up for hearing. However, encl. 15 was designed to cater for both the defendants.

It must be emphasised that the stand of Mr. Oommen Koshy from the very beginning was that the first defendant – Kolej Yayasan Pelajaran MARA, was not a legal entity.

The Factual Matrix

As alluded to earlier the plaintiff and the first defendant had entered into an agreement dated 22 December 1999 as seen in exh. "CCH1" which was annexed to encl. 3. That agreement makes for interesting reading material. Under that agreement, the first defendant appoints the plaintiff as independent advisers to recruit the China students to pursue the courses and programmes conducted at and by the first defendant. The terms of the agreement includes, *inter alia*:

(a) the plaintiff shall actively recruit the China students for enrolment at the first defendant and shall carry out all such marketing and promotional activities with a view to seeking and encouraging applications from prospective China students (see cl. 3.1 of the agreement);

(b) the first defendant shall provide or ensure the provision by the first defendant of academic support and accreditation to the China students who undertake the courses and shall ensure that there are adequate vacancies for the China students to study the courses at the first defendant (see cl. 4.1 of the agreement);

(c) the first defendant shall ensure that there be provided proper academic support by the first defendant's relevant faculty and academic staff and departments concerned and also adequate facilities for the China students, which include intensive seminars, synchronous or asynchronous tutorials, assignments marking, setting of examinations and marking of papers, invigilation or proctoring of examinations and examinations rooms (see cl. 4.3 of the agreement);

(d) the first defendant shall ensure that it continues to offer and maintain the courses thereat so as to enable the China students to complete the said courses and to graduate upon completion of the same (see cl. 5.1.1 of the agreement);

(e) the first defendant has the power to enter into, exercise its rights and perform and comply with its obligations under the agreement (see cl. 5.1.5 of the agreement).

Pursuant to cl. 7 of the agreement, it is agreed by the plaintiff and the first defendant that the agreement shall commence from 1 December 1999 and be valid for a period of five (5) years subject to a further extension of another five (5) years by the parties by mutual agreement in writing. Again, pursuant to cl. 8 of the agreement, it is agreed by the plaintiff and the first defendant that both parties shall be entitled to terminate at an early stage the agreement by giving three (3) months' notice. Clause 8.3 of the agreement stipulates that notwithstanding any termination of the agreement, the parties agree and declare that any termination shall be without prejudice to and shall not affect the rights and interests of the China students who have already enrolled for the courses and who are entitled to complete the courses.

The plaintiff successfully recruited the first batch of the China students comprising of eighteen (18) China students who arrived on 14 October 2000 and a further two (2) China students who arrived on 4 November 2000 and these aspirants intended to pursue the courses and programmes offered by the first defendant.

The first defendant issued letters of acceptance on 14 December 2000 to the second batch of the China students numbering seven (7) in all. Under those letters of acceptance, the seven (7) China students were scheduled to arrive

in February 2001 and to commence their courses and programmes on 26 February 2001. But, unfortunately, on 9 February 2001, the plaintiff was informed verbally by the chief executive of the first defendant that no China students were allowed to pursue the courses and programmes offered by the first defendant under the agreement. Subsequently, the first defendant issued a letter dated 26 February 2001 to the plaintiff wherein the first defendant categorically stated that they had received instructions to stop taking international students. The plaintiff was requested to stop recruiting the China students and to transfer the first batch of the China students currently at the first defendant to other colleges. The first defendant later issued a letter dated 22 March 2001 under caption, "To whom it may concern", wherein the first defendant stated that the admission date for all the international applications be postponed to 14 May 2001 in view of the start of the new intakes of the Local Universities in May 2001. It seemed that a copy of the first defendant's letter dated 22 March 2001 was forwarded by the first defendant to the plaintiff's counterpart in the People's Republic of China. On 11 April 2001 the first defendant issued a letter to the seven (7) China students, which formed the second batch, individually stating that their confirmation for admission had been postponed to 14 May 2001. It seemed that there were no follow-ups nor steps undertaken by the first defendant pursuant to the letter dated 22 March 2001. Steps were not taken to proceed to apply for the necessary approvals and the procurement of the students' visas from the relevant authorities in respect of the admission and intake of the seven (7) China students which comprised the second batch despite numerous queries and follow-ups by the plaintiff. As a consequence thereto, the plaintiff and the plaintiff's agent in the People's Republic of China had to attend to numerous queries and complaints by the parents of the seven (7) China students which comprised the second batch regarding the delay in obtaining the students' visas and the entry to Malaysia. By letter dated 11 April 2001, the plaintiff through its solicitors demanded that the first defendant expeditiously obtained the necessary approvals and the requisite visas from the relevant authorities in regard to the admission and entry of the seven (7) China students which comprised the second batch by 14 May 2001 but unfortunately the first defendant to date had failed, neglected and/or refused to do as demanded. It was averred that the first defendant has to date failed, neglected and/or refused to issue the relevant billing for year one of the course as stated in Schedule "A" of the agreement which was due on 12 April 2001 to the parents of the first batch of the China students currently studying in the first defendant's premises. It was said that the relevant billing would consist of the tuition fees and other expenditures which include the accommodation and food allowances for the first batch of the China students. It was further said that as a result of the non-issuance of the relevant billing, the first batch of the China students are

currently suffering from lack of expenses as their respective parents have yet to receive the billing in order to enable them to make the necessary payments. It was averred that for these reasons, the first defendant had breached the agreement by not complying with the terms of the agreement.

The legal executive of the second defendant by the name of Amir-Ul-Azmi Abdul Rahman affirmed an affidavit in reply on 27 June 2001 which was filed on the same day as seen in encl. 17. There he categorically stated that the first defendant was not a body established with separate legal entity. He deposed that the first defendant did not possess any legal capacity to enter into the agreement. He too stressed that the second defendant was not a party to the agreement. He deposed that the agreement was void and invalid and that the terms of the agreement were not enforceable in law. He said that the agreement was *ultra vires* the powers of the second defendant and, consequently, it was void and not valid. He too deposed that he would accept and use the statement of defence of the second defendant as part and parcel of his affidavit.

I will, in the course of my judgment, refer to the averments of Amir-Ul-Azmi Abdul Rahman in encl. 17 and the statement of defence of the second defendant. Reference to other affidavits of the parties would also be alluded to in this judgment.

To The Crux Of The Matter

It would be appropriate to highlight certain features in this case which are quite apparent:

(1) The agreement dated 22 December 1999 was entered into between the plaintiff and the first defendant only.

(2) The second defendant was not a party to that agreement and therefore cannot acquire any rights under it nor can the second defendant be subjected to liabilities under it. It would certainly be unjust to allow the second defendant to sue on the agreement when in the first place it could not even be sued under it (*Tweddle v. Atkinson* [1861] IB. & S. 393 at 398). In *Kepong Prospecting Ltd v. A.E. Schmidt* [1968] AC 810, a third party made a claim to enforce a contract under the law of Malaysia, where consideration need not move from the promisee. The Privy Council rejected the claim and said at p. 826 of the report:

> It is true that section 2(d) of the Contracts Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect.

(3) It was pointed out by Mr. Oommen Koshy, the learned counsel for the second defendant, that the first defendant is not a legal entity and as such, does not have the capacity to enter into the said agreement. That was certainly an interesting argument as it would add a different complexion to the whole case. And this argument is certainly tied up to the next point, which is:

(4) That the second defendant is a corporation established under the Majlis Amanah Rakyat Act 1966 (Revised 1992) Act 489 (hereinafter referred to as "the said Act") and pursuant to the Majlis Amanah Rakyat (Yayasan Pelajaran MARA) Order 1969 (hereinafter referred to as "the said Order") can never be doubted. I will now refer to the relevant sections in the said Act.

(5) It is ideal to refer to s. 6 of the said Act which governs the duties and powers of the Majlis Amanah Rakyat (which is referred to in the said Act as "the Majlis"). Now, s. 6(1) of the said Act enacts as follows:

> It shall be the duty of the Majlis to promote, stimulate, facilitate and undertake economic and social development in Malaysia and more particularly in the rural areas thereof.

(6) The relevant parts of s. 6(2) of the said Act read as follows:

> Subject to the prior approval of the Minister, the Majlis shall have powers for the purpose of the discharge of its duty under subsection (1):
>
> (e) to establish and maintain training institutions; and
>
> (f) to do all acts which the Majlis considers desirable or expedient.

(7) It is also ideal to refer to s. 25 of the said Act which provides for the power to establish corporations and that section enacts as follows:

> (1) The Majlis may from time to time by Order published in the Gazette establish, with the approval of the Minister, a corporation by such name as the Majlis may think fit to carry out and have the charge, conduct and management of any project, scheme or enterprise (referred to in this Act as a 'registered development project') which has been planned or undertaken by the Majlis in execution of its duty or discharge of its functions under section 6.
>
> (2) Schedule IV shall apply to the corporation established by the Majlis under subsection (1).

(8) Reference should also be made to s. 1 of Schedule IV of the said Act which gives the power to the Majlis to make regulations in respect of a corporation and it reads as follows:

> The Majlis shall, on or before the date on which any corporation is established under section 25, make regulations in respect of such corporation defining:
>
> (a) the purposes and objects for which such corporation is established;
>
> (b) the rights, powers, duties and functions of such corporation;
>
> (c) the system of management thereof; and
>
> (d) the relations between such corporation and the Majlis and its rights of control over such corporation.

(9) There is also a need to refer to s. 7 of Schedule IV of the said Act which provides as follows:

> Every corporation established under section 25 shall be a body corporate by such name as the Majlis shall give to such corporation and shall have perpetual succession and a common seal and may sue and be sued in such name, and for the purpose of carrying into effect the registered development project for which it has been established may enter into contracts and may hold and deal in or with any immovable or movable property and may do all other matters and things incidental or appertaining to a body corporate not inconsistent with this Act and subject to such restrictions or limitations as may be prescribed by the Majlis in each case.

(10) I will now allude to the purposes and objects of the second defendant and this can amply be seen in r. 2 of the said Order which in its original text states as follows:

> Tujuan-tujuan Yayasan adalah:
>
> (a) untuk mengadakan kemudahan pelajaran dan latihan bagi Bumiputera;
>
> (b) untuk menggalakkan pelajaran dan latihan Bumiputera;
>
> (c) untuk menubuh dan mengadakan biasiswa, pinjaman, pemberian dan lain-lain bantuan wang kepada Bumiputera bagi maksud membolehkan mereka melanjutkan pelajaran.

Strictly applying r. 2 of the said Order to the facts of the present case, it can safely be surmised that there are three objects to the creation of the second defendant. And that would be confined to the provisions relating to the training and the educational facilities of Bumiputeras only. Rule 2 of the said Order does not empower the second defendant to provide training and educational facilities to non-Bumiputeras. The China students from both batches – the first and the second, would automatically be out of range of r. 2 of the said Order. The clear cut parameter as set out in r. 2 of the said Order can never be waived and the second defendant was bound to adhere to it.

All these features as alluded to above would cripple and undermine the plaintiff's application in encl. 15 to the core. "MARA" has historically been used as an acronym for Majlis Amanah Rakyat (hereinafter referred to as "MARA") and it is a statutory corporation and under the law, all its powers are derived from the said Act. It would therefore be correct to say that MARA do not possess any inherent powers and the issue of whether MARA has the power to do a particular act has to be determined by considering whether the power to do that particular act is given to MARA by the said Act. In reviewing the powers of the second defendant, the same arguments would also be applied. Put it in another way, by the same token, a similar principle applies to the second defendant's powers, which legally speaking, are derived from the said Order. A case in point would be that of *Malaysia Shipyard And Engineering Sdn. Bhd. v. Bank Kerjasama Rakyat Malaysia Bhd* [1985] 2 MLJ 359, a decision of the then Supreme Court (majority decision by Salleh Abas LP, Abdul Hamid CJ (Malaya) and Abdoolcader SCJ and dissenting judgments by Wan Suleiman and Seah SCJJ on other points). In that case, the respondents issued a guarantee in favour of the appellants agreeing to pay a sum of money to the appellants in the event a third party made default under a contract between the third party and the appellants. The third party defaulted and the appellants made a claim under the said guarantee. The issue that confronted the court was whether the respondents had the power to issue a guarantee to a third party who was not a member of the Co-operative. If the respondents had no power to do so then it would not be liable under the guarantee. The then Supreme Court decided the issue by reference to the Co-operative Societies Act 1948 (Revised 1983) Act 287, and the Rules made thereunder together with the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978. The then Supreme Court, by a majority of 3-2, decided that the respondents had no power under the Co-operative Societies Act 1948 (Revised 1983) Act 287, or the Rules made thereunder to issue a guarantee to a party who was not a member of the Co-operative and that being the case it was held that the respondents were not liable under the guarantee. Salleh Abas LP writing a separate judgment had this to say at p. 360 of the report:

Unlike a natural person whose position in law is that he or she can do anything unless prohibited or restricted by law, a co-operative society (of which the appellants being registered under section 7 of the Act are one) being a statutory corporation is not allowed to do anything unless authorized by the statute under which it is incorporated. In other words, the principle of law regarding powers applicable to a co-operative society is the very reverse of that which is applicable to a natural person. The principle is succinctly stated in *9 Halsbury's Laws of England*, 4th edition, para 1333, at p. 779, as follow(s):

> 1333. Statutory corporation. The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

The same principle was enunciated by Abdoolcader J (as he then was) in *Public Prosecutor v. Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 180, 205.

Continuing at p. 363 of the report, his Lordship Salleh Abas LP said:

This means that whilst a person *sui juris* can enter into all kinds of contracts irrespective of the subject matter – barring only illegal contracts and public policy – a statutory corporation's power or capacity to enter into contracts is only as extensive and as restricted as its object and all its other powers are. As an illustration of this principle is *Ashbury Railway Carriage and Iron Co. v. Riche* [1875] LR 7 HL 653, 658, wherein the House of Lords held that a contract entered into by a company which was outside the Memorandum of Association was *ultra vires* and void.

Having regard to all these authorities, the conclusion is inescapable that the respondents' power to enter into contracts must similarly be limited and circumscribed by the object of their incorporation under section 4 and is as extensive and restricted as their other powers are, be they general or special. *Colman*'s case *(supra)*, *Small v. Smith (supra)*, *Ashbury v. Riche (supra)* and *Birkdate District Electric Supply Co. v. Southport Corpn. (supra)* and *Shrews and Birmingham Rly. Co. v. N.W. Rly Co. (supra).*

In conclusion, I hold that this guarantee is *ultra vires* and *void ab initio*.

Also writing a separate judgment in the same case, Abdul Hamid Omar CJ (Malaya) succinctly said at p. 363 of the report:

The respondent is a co-operative society registered under the Co-operative Societies Act 1948 (Revised-1983 as Act 287) (hereinafter called the Act). Fundamentally the functions of a society so registered must not only be consistent with its objectives but also the purposes of the Act. It seems unreasonable, in my view, to hold that it can operate outside the scope allowed by law or the rules made under the Act.

In the same case, Abdoolcader SCJ, writing a separate judgment, aptly said at p. 369 of the report:

> A corporation created by statute for particular purposes can only make such contracts as it is expressly or by necessary implication empowered to make by the statute creating it (*Baroness Wenlock v. River Dee Company* [1887] 37 Ch. D 675n; 10 App. Cas. 354, a decision of the Court of Appeal affirmed by the House of Lords (10 App. Cas. 354); *Attorney General v. Great Eastern Railway Company* (1879-80)5 App. Cas. 473, 481). Contracts purporting to be made by statutory corporations which are outside the powers conferred by statute are *ultra vires* and void. The purpose of the doctrine of *ultra vires* is said to be to protect the body corporate and its constituents so that corporate funds will not be expended on activities of an unknown or speculative nature, and as Professor Gower illustrates, it ensures, for example, that an investor in a gold mining company does not find himself holding shares in a fried-fish shop.

It is significant to note that another panel of the then Supreme Court (Harun Hashim, Mohamed Yusoff and Jemuri Serjan SCJJ) in *Chase Manhattan Bank NA v. Mercantile Co-operative Thrift & Loan Society Ltd* [1992] 2 MLJ 168 robustly applied the case of *Malaysia Shipyard And Engineering Sdn Bhd v. Bank Kerjasama Rakyat Malaysia Bhd (supra).* The facts in *Chase Manhattan Bank (NA) (supra)* may be stated as follows. There the respondent, a co-operative society, had agreed to give a pledge and letter of set-off to the appellant. The transactions were to benefit a company in which the society held 20% of the equity and in which some of the directors of the society were also directors. A sum was set off by the appellant. The respondent's management committee argued that the pledge and set off were transactions and therefore permitted by s. 32 of the Co-operative Societies Act 1948. In dismissing the appeal, the then Supreme Court held that the pledge and set-off documents were financial commitments which were not covered by s. 32 of the Co-operative Societies Act 1948. The society, according to the Supreme Court, had no power to execute such documents and both the documents were said to be *ultra vires* and *void ab initio*. Harun Hashim SCJ writing for the then Supreme Court had this to say at p. 174 of the report:

> Be that as it may, whether the pledge and letter of set-off are *intra vires* or *ultra vires* depends not on the byelaws of the society but on the Act and the rules made thereunder. That this is so is clearly illustrated by the case of *Malaysia Shipyard & Engineering Sdn Bhd v. Bank Kerjasama Rakyat Malaysia Bhd* [1985] 2 MLJ 359, a decision of this court constituted of five judges. All five judges were unanimous on this point. In that case, the respondents (also a co-operative society) had given a guarantee by which they agreed to indemnify the appellants in the event a third party company failed to perform its contract with the appellants. The third party failed to perform its contract,

whereupon the appellants terminated the contract and thereafter sued the respondents upon the guarantee. On the validity of the guarantee, however, three of the judges held the guarantee was *ultra vires* and *void ab initio*. The other two dissenting judges held the guarantee was *intra vires*.

Further down at p. 175 of the report, his Lordship Harun Hashim SCJ continued to say:

The next question is, how does all this affect the bank? From what we have said, Muda is clearly a third party beneficiary in the aforesaid transactions and falls squarely in the same position as the third party beneficiary in the *Malaysia Shipyard and Engineering* case [1985] 2 MLJ 359. Whether the society had the power to give the pledge here is governed by the Act. Salleh Abas LP (as he then was) said in *Malaysia Shipyard and Engineering* at p. 360:

> Section 30 clearly empowers the respondents to give loans and even so the power is restricted to the giving of loans to certain classes of borrowers only, namely, only to those connected with the respondents. Section 31, on the other hand, empowers the respondents to borrow from non-members in the form of receiving deposits and loans from them, and here again the borrowing power is limited to the extent and conditions prescribed by the rules and byelaws. The giving of a guarantee is neither giving nor receiving loan. It is a distinct and separate kind of dealing altogether. Although a guarantee purports to create liability on the surety, in no sense could it be said that the surety is borrowing the guaranteed sum from the creditor (the person to whom the guarantee is given) or giving a loan of that amount to the principal debtor (the person for whose advantage the guarantee is given). (See *In Re Queen Anne and Garden Mansions Co.*). Thus, since a guarantee is neither a loan nor a borrowing, both ss. 30 and 31 do not apply to the giving of a guarantee by the respondents.

Now, these authorities showed that the powers of a statutory corporation came from the statute that created it. Independent of the statute, the statutory corporation have no inherent or implied powers. Thus, if a statutory corporation enters into any contract which is not authorised by the statute creating it, then that contract would be *ultra vires* and *void ab initio*.

The first defendant was not a legal entity created by statute. The agreement between the plaintiff and the first defendant had nothing to do with the second defendant. The plaintiff could not rely on the agreement which it had entered with the first defendant in order to bind the second defendant. To say that the second defendant was bound by the agreement that was entered between the plaintiff and the first defendant would be to go against the doctrine of privity of contract. If it could be argued that the agreement was binding and

capable of binding the second defendant, the latter's power to enter into such an agreement was "circumscribed by the object" of "its incorporation" under r. 2 of the said Order.

I must reiterate that the said Order that establishes the second defendant in clear language defines the powers of the second defendant. Rule 2 of the said Order as reproduced earlier provides that all the powers of the second defendant are confined to the training and educational studies of the Bumiputeras. The cases of *Malaysia Shipyard And Engineering Sdn Bhd (supra)* and *Chase Manhattan Bank NA (supra)* when applied to the second defendant would mean that it could not and, in fact, did not have the powers to enter into any contract that run counter to the said Order. Any exercise of any power beyond the scope of the express powers in the said Order must be construed as *ultra vires* the powers of the second defendant and therefore *void ab initio*.

Notwithstanding the existence of cl. 5.1.5 of the agreement which states that the first defendant has the power to enter into any agreement and also to exercise its rights and comply with the obligations under the said agreement, it was submitted that the said agreement cannot vest the first defendant with the authority to do an act which was not provided for in the said Order. This was indeed a correct submission. Standing by itself the agreement cannot give the first defendant the authority to do an act which was clearly not provided for in the said Order. The agreement, in its entirety, was in direct conflict with the provisions of the said Order and the agreement cannot be made right by merely adding cl. 5.1.5 in an attempt to give the first defendant the power to do an act which was prohibited in law. In my judgment, the agreement cannot override nor take precedence over the provisions of the law.

Going on an uphill task, it was argued on behalf of the plaintiff that there were no express or implied provisions in the said Act or the said Order which prohibited foreign students from studying with the first defendant. It was vigorously argued that foreign students should be allowed entry as this would promote, stimulate and facilitate economic and social development in Malaysia. It was emphasised that the entry of the China students would benefit our country economically, socially and politically. Sadly, all these arguments overlooked one salient and crucial point: were they expressly allowed by the said Act or the said Order? Certainly not. As illustrated, to bring in the China students would go against the grain of the said Act and the said Order. As presently worded, the said Act and the said Order do not contain provisions to allow the entry of the China students into the first defendant. The principle of law as distilled from the case of *Malaysia Shipyard And Engineering Sdn Bhd (supra)* would certainly be read in favour of the defendants. In a nutshell,

Lord Blackburn in *The Attorney-General & Ephraim Hutchings (Relator) v. The Directors, & C., Of The Great Eastern Railway Company* [1879-80] 5 App Cas 473 at 481 and Lord Halsbury LC in *London County Council v. The Attorney-General And Others* [1902] AC 165 at 167 said that the powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it. This time honoured principle of law was applied in *The Directors, & C., Of The Ashbury Railway Carriage and Iron Company (Limited) v. Hector Riche* [1874-75] 7 LR HL 653. In *Elizabeth Dowager Baroness Wenlock And Others v. The River Dee Company* [1884-85] 10 App Cas 354 at 360, 361, HL, Lord Blackburn said that the principles laid down in *Ashbury Railway Carriage and Iron Company (Limited) v. Hector Riche (supra)*, and *The Attorney-General & Ephraim Hutchings (Relator) v. The Directors, & C., Of The Great Eastern Railway Company (supra)*, applied to other corporations besides those created under the enactments. That the powers of the corporations are curtailed and circumscribed by the statutes which created and regulated those corporations received its stamp of approval in an array of cases. I will now cite them in succession:

(1) *Amalgamated Society of Railway Servants v. Osborne* [1910] AC 87 at 94, HL;

(2) *The Company of Proprietors of The Rochdale Canal v. Radcliffe* [1852] 18 QB 287;

(3) *The Directors, & C., Of The Eastern Counties Railway Company v. Henry Hawkes* [1855] 5 HL Cas 331 at 382;

(4) *The National Guaranteed Manure Company (Limited) v. Donald And Another* [1859] 4 H & N 8;

(5) *Hare v. London and North-Western Railway Company* [1861] 2 J & H 78;

(6) *In Re The Joint Application Of The Great Northern Railway Company and The Great Central Railway Company* [1908] 24 TLR 417, CA;

(7) *Attorney-General v. Great Northern Railway Company* [1909] 1 Ch 775, CA;

(8) *Coats v. Herefordshire County Council* [1909] 2 Ch 579, and on appeal *vide* [1909] 2 Ch 601, CA;

(9) *Attorney-General v. Smethwick Corporation* [1932] vol. 1-2 Ch 562, CA; and

(10) *Charles Roberts & Co., Ltd v. British Railways Board* [1964] 3 All ER 651, [1965] 1 WLR 396.

I have this to add. That the powers of a corporation cannot extend any further than what was expressly stated in the statute *(Elizabeth Dowager Baroness Wenlock v. The River Dee Company (supra))*. The powers of a corporation too would necessarily and properly be stated in the statute that created it in order to effectively carry out the purposes of its incorporation (*Colman, On Behalf, & C., v. Eastern Counties Railway Company* [1846] 10 Beav 1 at 14, per Lord Langdale MR; *The South Yorkshire Railway and River Dun Company v. The Great Northern Railway Company* [1853] 9 Exch 53 at 84, per Parke B; *The Trowbridge Water Company v. Wilts County Council* [1909] 1 KB 824; *S. Pearson & Son, Limited v. Dublin and South Eastern Railway Company* [1909] AC 217 at 220, HL, per Lord Loreburn LC; *Attorney-General v. Corporation Of Leicester* [1910] 2 Ch 359; *Trustees Of The Harbour Of Dundee v. D. & J. Nicol And Others* [1915] AC 550 HL; *Deuchar v. Gas Light and Coke Company* [1925] AC 691, HL; *Wimbledon and Putney Commons Conservators v. Tuely* [1931] 1-2 Ch 190; and *Armour v. Liverpool Corporation* [1939] Ch 422, [1939] 1 All ER 363). In simple language, it means this. What the statute does not expressly or impliedly authorise is to be taken as prohibited. Likewise here, the said Act and the said Order did not expressly or impliedly authorise the defendants to take in the China students and that must be taken to be prohibited. I am constrained to hold that the whole purpose of the said Act and the said Order being enacted was exclusively for the advancement of Bumiputera students. It would certainly be absurd if foreign students from the People's Republic of China – the China students, were allowed entry but, on the other hand, the entry of local students who are non-Bumiputeras are disallowed. To adopt the argument of the learned counsel for the plaintiff would defeat the purpose of enacting the said Act and the said Order. The plaintiff seemed to suggest and advocate that local non-Bumiputera students should also be allowed entry because this would also "promote and stimulate the economic and social development of Malaysia". But the long line of authorities as alluded to earlier would certainly put an end to that kind of suggestion. The exclusive rights of the Bumiputeras are enshrined in the Federal Constitution. Article 153 of the Federal Constitution provides for reservation of special benefits for the Malays and natives of any of the States of Sabah and Sarawak and that article is worded as follows:

> 153. Reservation of quotas in respect of services, permits, etc., for Malays and natives of any of the States of Sabah and Sarawak.
>
> (1) It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.

(2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.

(3) The Yang di-Pertuan Agong may, in order to ensure in accordance with Clause (2) the reservation to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities, give such general directions as may be required for that purpose to any Commission to which Part X applies or to any authority charged with responsibility for the grant of such scholarships, exhibitions or other educational or training privileges or special facilities; and the Commission or authority shall duly comply with the directions.

(4) In exercising his functions under this Constitution and federal law in accordance with Clauses (1) to (3) the Yang di-Pertuan Agong shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him.

(5) This Article does not derogate from the provisions of Article 136.

(6) Where by existing federal law a permit or licence is required for the operation of any trade or business the Yang di-Pertuan Agong may exercise his functions under that law in such manner, or give such general directions to any authority charged under that law with the grant of such permits or licences, as may be required to ensure the reservation of such proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

(7) Nothing in this Article shall operate to deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him or to authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of a person any permit or licence when the renewal or grant might reasonably be expected in the ordinary course of events.

(8) Notwithstanding anything in this Constitution, where by any federal law any permit or licence is required for the operation of any trade or business, that law may provide for the reservation of a proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak; but no such law shall for the purpose of ensuring such a reservation:

(a) deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him; or

(b) authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of any person any permit or licence when the renewal or grant might in accordance with the other provisions of the law reasonably be expected in the ordinary course of events, or prevent any person from transferring together with his business any transferable licence to operate that business; or

(c) where no permit or licence was previously required for the operation of the trade or business, authorise a refusal to grant a permit or licence to any person for the operation of any trade or business which immediately before the coming into force of the law he had been *bona fide* carrying on, or authorise a refusal subsequently to renew to any such person any permit or licence, or a refusal to grant to the heirs, successors or assigns of any such person any such permit or licence when the renewal or grant might in accordance with the other provisions of that law reasonably be expected in the ordinary course of events.

(8A) Notwithstanding anything in this Constitution, where in any University, College and other educational institution providing education after Malaysian Certificate of Education or its equivalent, the number of places offered by the authority responsible for the management of the University, College or such educational institution to candidates for any course of study is less than the number of candidates qualified for such places, it shall be lawful for the Yang di-Pertuan Agong by virtue of this Article to give such directions to the authority as may be required to ensure the reservation of such proportion of such places for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

(9) Nothing in this Article shall empower Parliament to restrict business or trade solely for the purpose of reservations for Malays and natives of any of the States of Sabah and Sarawak.

(9A) In this Article the expression 'natives' in relation to the State of Sabah and Sarawak shall have the meaning assigned to it in Article 161A.

(10) The Constitution of the State of any Ruler may make provision corresponding (with the necessary modifications) to the provisions of this Article.

Flowing from this, the constitutionality of the said Act and the said Order is beyond question and it is in no way discriminatory. Andrew Harding in his book entitled, *"Law, Government and the Constitution in Malaysia"* said at p. 233 of the book:

> Little research has been done on the detailed practical implementation of Art. 153, which is again probably a function of the Sedition Act, which makes critical comment, at least, problematical. However, such figures as have been published indicate that the principle of Art. 153 has been put into operation with great determination, although the objectives have not all been met.

At p. 234 of the same book, Andrew Harding wrote:

> It is in relation to education, especially tertiary education, that Art. 153 has had most effect, and the position before 1969, in which period very few bumiputera were admitted to university, especially to science faculties, has been reversed. One important facet of Malay unrest in 1969 was the fact that Malays lagged behind other races in respect of university places. The universities admitted students on merit alone, which resulted in a socially dangerous imbalance, with a much greater proportion of non-Malays enrolled at universities, compared with Malays. In addition there was an alarming under-recruitment of Malays in faculties other than Arts. Thus a part of the NEP reforms was designed to rectify this imbalance.

Tun Mohamed Suffian bin Hashim in his famous book entitled, *"An Introduction To The Constitution of Malaysia"*, 2nd edn, at p. 321, aptly said in relation to art. 153 of the Federal Constitution:

> Protective provisions were written into the Malaysian constitution not with the intention of pulling back the advancement of the non-indigenous people but with the intention of securing the advancement of the indigenous people who, through no fault of their own, were and are educationally, socially and economically less advanced, and the leaders of the non-indigenous people consented to these provisions in return for generous citizenship terms that enabled a large number of them to become citizens by a stroke of the pen.

L.A. Sheridan and Harry E. Groves in their book entitled, *"The Constitution Of Malaysia"* had this to say of art. 153 of the Federal Constitution (see p. 213 of their book):

> **Commentary**
>
> This article had its inspiration in the protective discrimination provisions of the Indian constitution; but it is fundamentally different from those provisions, because the class in whose favour the discrimination operates in Malaysia is the class which possesses political control, the Malays. The theory behind the protection of Malays is that if they were not specially favoured in government employment, scholarships and the other matters provided for, they would be completely overwhelmed by the other racial groups, particularly the Chinese, who already control the economy and dominate the professions.

All these expositions on the effects and ramifications of art. 153 of the Federal Constitution are germane to the occasion at hand. They are certainly thought provoking.

In an attempt to show that a wide interpretation should be accorded to the said Act and the said Order, the plaintiff relied on several cases, namely:

(1) *Arab Malaysian Finance Bhd v. Meridien International Credit Corporation Ltd London* [1993] 4 CLJ 307 SC;

(2) *American Express Sdn Bhd v. Dato' Wong Kee Tat & Ors* [1990] 1 CLJ 17; [1990] 1 CLJ (Rep) 1 SC;

(3) *Hughes and others v. Asset Managers plc* [1995] 3 All ER 669 CA;

(4) *Phoenix General Insurance Co of Greece SA v. Administratia Asigurarilor de Stat* [1987] 2 All ER 152 CA;

(5) *Foo Kee Boo & Anor v. Ho Lee Investments (Pte) Ltd* [1988] 3 MLJ 128 HC;

(6) *Archbolds (Freightage), Ltd. v. S. Spanglett, Ltd. (Randall Third Party)* [1961] 1 All ER 417 CA; and

(7) *Vita Food Products Inc. v. Unus Shipping Co., Ltd (In Liquidation)* [1939] 1 All ER 513 PC.

but unfortunately these cases were not related to statutory corporations and this was the distinguishing feature that set apart these cases from the facts of the present case.

In my judgment, the said Act and the said Order must be read strictly in accordance with the intention of Parliament. Had the legislators intended to include non-Bumiputera students, be it local or foreign, it would have made provisions to that effect. The language of the said Act and the said Order are clear and unambiguous and the question of interpretation has no role to play at all. The rule of construction is simply "to intend the legislature to have meant what they have actually expressed" (*The King v. The Inhabitants Of Banbury* [1834] 1 AD & E 136, per Parke J at p. 142). And the object of all interpretation is to discover the intention of Parliament, but according to Lord Parker CJ in *Capper And Another v. Baldwin* [1965] 2 QB 53, 61, "the intention of Parliament must be deduced from the language used." However, where the language is plain, just like the present case, and it admits of but one meaning the task of interpretation can hardly be said to arise. It has been said, time and again, that where by the use of clear and unequivocal language

which is capable of only one meaning, anything that is enacted by the legislature must be enforced accordingly notwithstanding that its enforcement may be harsh or absurd or contrary to common sense (*Cartledge And Others v. E. Jopling & Sons Ltd.* [1963] AC 758; *Miller v. Salomons* [1852] 7 Ex. 475, per Pollock CB; *Re The British Farmers Pure Linseed Oil Cake Company (Limited); Nicholls' Case* [1878] 47 LJ Ch. 415, per Jessel MR; and *Magor and St. Mellons Rural District Council v. Newport Corporation* [1952] AC 189). Here, the said Act and the said Order employed words that were plain, clear and unequivocal thereby giving rise to only one meaning and that meaning must be given effect notwithstanding its harshness, its absurdity and that it was against common sense. But the validity of the said Act and the said Order can never be doubted. Its constitutionality is governed by art. 153 of the Federal Constitution. The duty of this court is simply to expound the law. It is as simple as that. This court will simply "leave the remedy (if one be resolved upon) to others" (per Lord Birkenhead in *Sutters v. Briggs* [1922] 1 AC 1, at p. 8).

Undaunted, it was strenuously argued by the plaintiff that a wide interpretation must be accorded to the said Act and the said Order, but I was not convinced and I must say that such an approach may well be applied to statutes governing individuals and companies. In this context, the speech of Tun Salleh Abas LP in the case of *Malaysia Shipyard And Engineering Sdn Bhd (supra)* must be put to the forefront. There his Lordship succinctly said at p. 363 of the report as reproduced earlier that "a statutory corporation's power or capacity to enter into contracts" are "circumscribed by the object of their incorporation." At the end of the day, the second defendant can only act within the confines of the said Act and the said Order and nothing else.

Next, it was argued on behalf of the plaintiff that the first defendant had the legal capacity to enter into the said agreement because it operated with the approval from the Ministry of Education and to confound the matter further it was argued that the said agreement contained provisions empowering the first defendant to enter into the said agreement. In rebuttal, a submission was made on behalf of the second defendant. It was pointed out that it was the second defendant and not the first defendant which was registered with the Ministry of Education. It was emphasised by way of a reiteration that the first defendant was not a legal entity and it did not have any legal capacity to enter into the said agreement. It was also submitted that the statement by the first defendant, which was not a legal entity, in the said agreement professing solemnly that it had the authority to enter into the said agreement did not give the first defendant the necessary authority or legal capacity to do the same. What was stated by the first defendant in the said agreement cannot clothe the first defendant with any legal capacity to enter into the said

agreement. The learned counsel for the second defendant submitted, quite rightly, that the issue of the first defendant operating under the approval of the Ministry of Education was never raised by the plaintiff in its statement of claim or in its affidavits. Thus, so the submission went, the plaintiff was barred from raising this new issue that was not pleaded nor alluded to in its affidavits. Cotton LJ aptly said in *Philipps v. Philipps And Others* [1878-79] 4 QBD 127, 139:

> But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.

In *Hadmor Productions Ltd. And Others v. Hamilton And Another* [1983] 1 AC 191 at p. 233, Lord Diplock echoed the same sentiments:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is.

In short, each party must plead all the material facts which that party proposes to rely upon otherwise that party will be barred from adducing any evidence of them in the course of the trial. The same principle would also apply when the party is making a submission of its case in that such a submission must be confined to the material facts that have been pleaded.

Next, it was argued on behalf of the second defendant to the effect that the plaintiff had legal representation in the course of preparing and executing the said agreement whereas the first defendant was without legal representation. So it was argued that the solicitors for the plaintiff should have been more prudent and should have checked the position of both parties before drafting the said agreement. Indeed if the solicitors for the plaintiff had done the necessary homework, it would have discovered that the first defendant was not a legal entity and, consequently, had no legal capacity to enter into the said agreement. But alas, this was not done. The plaintiff must now bear the brunt of that oversight.

Principles To Be Applied For A Mandatory Injunction

The plaintiff relied on s. 53 of the Specific Relief Act 1950 to argue that this court has the jurisdiction to compel the defendants to perform the said agreement in order to prevent a breach of an obligation. That section enacts as follows:

53 Mandatory injunctions

When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

ILLUSTRATIONS

(a) A, by new buildings, obstructs lights to the access and use of which B has acquired a right by prescription. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights.

(b) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.

(c) In the case put as illustration (i) to section 52, the court may also order all written communications made by B, as patient, to A, as medical adviser, to be destroyed.

(d) In the case put as illustration (v) to section 52 the court may also order A's letters to be destroyed.

(e) A threatens to publish statements concerning B which would be punishable under Chapter XXI of the Penal Code. The court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.

(f) A, being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication.

(g) In the cases put as illustrations (s) and (t) to section 52, and as illustrations (e) and (f) to this section, the court may also order the copies produced by piracy, and the trade-marks, statements, and communications, therein respectively mentioned, to be given up or destroyed.

And a close scrutiny of s. 53 of the Specific Relief Act 1950 would reveal that there is a condition to be fulfilled before the court is said to have jurisdiction to compel performance of certain acts in order "to prevent the breach complained of." But, in the present case, the main issue to be decided by this court was not whether the defendants will be in breach of the said agreement but rather whether the agreement was, in the first place, valid or *ultra vires* the powers of the defendants. If it was valid, well and good. It would be binding. If it was *ultra vires* then the consequence would be that the agreement would be *void ab initio*. However, I have held and it was part and parcel of my judgment that the agreement was not valid as it contravened the said Act and the said Order. It follows therefore that the question as to

whether the defendants should be compelled to carry on with the said agreement did not arise at all because, as I said, the said agreement was not valid in the first place. It was wishful thinking on the part of the plaintiff to rely on s. 53 of the Specific Relief Act 1950. This court cannot compel the defendants to perform a certain act which would ultimately be *ultra vires* the said Order.

The law in regard to the granting of interlocutory mandatory injunction has been crystallised in a number of cases. Suffice for this exercise that I refer to some of these cases. For starters, I would refer to the case of *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150, a decision of the then Federal Court where the court held, *inter alia*, that an interim or interlocutory mandatory injunction would never be granted before trial save in exceptional and extremely rare cases. Abdoolcader J, delivering an oral judgment on behalf of the then Federal Court, in style, said at p. 150 of the report:

> I would make two observations on the interlocutory injunction that was sought and granted.
>
> The first is that it is couched in prohibitory terms restraining the appellant until the trial of the suit from remaining in the quarters but it is in effect a mandatory injunction. Equity looks to the substance and intent and not to the form, and the interlocutory injunction sought and granted although prohibitory in language is mandatory in substance and effect (*Shepherd Homes Ltd. v. Sandham* [1970] 3 WLR 348, 359 (at p. 359); *Hounslow Local Borough Council v. Twickenham Garden Developments Ltd.* [1970] 3 WLR 538, 570-1 (at p. 570-1)), and as I said in my judgment in *Wah Loong (Jelapang) Tin Mine Sendirian Berhad v. Chai Nyen Yiok* [1975] 2 MLJ 109, an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases.
>
> The second is that the interlocutory injunction virtually gives to the respondents on their claim the full relief actually sought to be secured at the final hearing, as I do not seriously think the respondents are really concerned about their claim for damages against a labourer. As I said however in *Wah Loong* [1975] 2 MLJ 109, the court is not precluded from making such an order when the matter is viewed on a balance of convenience in the light of the principle enunciated in *Woodford v. Smith* [1970] 1 WLR 806.

At p. 151 of the report, his Lordship Abdoolcader J continued in a serious vein:

> I think the basic principles in *American Cyanamid* [1975] AC 396 can be aptly put thus: In order to be able to grant an interlocutory injunction, the court does not have to be satisfied that if the case went to trial on no other evidence than is before the court on the hearing of the application for interlocutory relief,

the plaintiff would be entitled to a permanent injunction in the same terms as that sought in the interlocutory proceedings. Where damages would be an adequate remedy, no interlocutory injunction should normally be granted, but if there is doubt as to the adequacy of damages, the question of the balance of convenience arises, and although it might not be improper to take into account, as one of the many varying factors relevant to this question, the relative strength of each party's case, this should be done only on the basis of facts disclosed by the affidavit evidence as to which there is no credible dispute, without embarking on anything resembling a trial of the action. When an interlocutory injunction is sought, the balance of convenience will be the overriding consideration.

Continuing further down on the same page, his Lordship Abdoolcader J summed up the matter in these fine words:

American Cyanamid [1975] AC 396 has been discussed and applied in a number of cases such as *Fellowes & Son v. Fisher* [1976] QB 122 and *Hubbard v. Pitt* [1976] QB 142, and the position as formulated by these cases has been felicitously put by Slade J, in *In re Lord Cable, decd.* [1977] 1 WLR 7, 19 (at p. 19) to this effect, that it is necessary for any plaintiff seeking interlocutory relief to show that there is at least a serious question to be tried and to adduce sufficiently precise factual evidence to satisfy the court that he has a real prospect of succeeding in his claim at the trial.

I cannot see from the affidavits filed that the respondents have met this test. There is no precise factual evidence to point to a real prospect of success at the trial in view of the pending determination by the Industrial Court in relation to the appellant's employment. Mr. Sankey for the respondents submits that reinstatement is only one of the many reliefs the Industrial Court can award and that it does not necessarily have to order reinstatement of the appellant, but as Slade J, said in *In re Lord Cable, decd.* [1977] 1 WLR 7, 19 (at p. 19):

> If the facts adduced by him in support of his motion do not by themselves suffice to satisfy the court as to this, he cannot in my judgment expect it to assist him by inventing hypotheses of fact upon which he might have a real prospect of success.

Even ventilating the other factors specified in the principles enunciated, I am of the view that damages would be an adequate remedy in the circumstances of this case, and there is indeed a claim by the respondents for damages in these proceedings.

Next, it would be the case of *Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd* [1987] 1 CLJ 474; ([1987] CLJ (Rep) 396) SC, where Syed Agil Barakbah SCJ writing for the then Supreme Court succinctly said see p. 476 (p. 398) of the report:

> The discretionary power of the Court to grant a mandatory injunction is provided by section 53 of the Specific Relief Act, 1950 (Act 137). By judicial process, the power is extended to the granting of an interlocutory mandatory injunction before trial. Such discretion however must be exercised and an injunction granted only in exceptional and extremely rare cases as was held in *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 MLJ 109 and confirmed by the Federal Court in *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 MLJ 150. The case must be unusually strong and clear in that the Court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result. (See *Gibb & Co. v. Malaysia Building Society Bhd.* [1982] CLJ 185; [1982] CLJ (Rep) 99 and *Shepherd Homes Ltd. v. Sandham* [1971] 1 Ch. 340, 349).

This would be followed by the case of *MBf Holdings Bhd v. East Asiatic Co (Malaysia) Bhd* [1995] 4 CLJ 73, where KC Vohrah J (now JCA) after dismissing the plaintiff's application for an interlocutory mandatory injunction said at p. 76 of the report:

> The ordinary *American Cyanamid* principles are not applicable in an application for a mandatory injunction. In the case of a mandatory interlocutory injunction, for its grant there must be a high degree of assurance that at the trial it will appear that the injunction was rightly granted (*Shephard Homes Ltd v. Sandham* [1971] Ch 340; [1970] 3 All ER 402; [1970] 3 WLR 348; *Locabail International Finance Ltd v. Agroexport* [1986] 1 All ER 901; [1986] 1 WLR 657). This is far more than is required for a prohibitory injunction to which the *American Cyanamid* principles apply. As put by LA Sheridan (at p. 35):
>
> > That may be no more than a way of saying that the balance of convenience is more often against a mandatory injunction than it is against a prohibitory injunction at the interlocutory stage because an interlocutory mandatory injunction is more likely to involve the defendant in expenditure, more likely to be the final determination of the dispute and more difficult to compensate if the defendant wins at the trial.
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> In *Jakeman v. South West Thames Regional Health Authority* [1990] IRLR 62, Auld J said that in the absence of special circumstances, an interlocutory mandatory injunction would not be granted unless the case was clear and one which should be decided at once.

Further down at p. 76 of the report, his Lordship KC Vohrah J (now JCA) said:

Clearly, therefore, to my mind, there are serious disputes as to facts which need to be resolved at trial, and the case is not a strong and unusual case for me to grant the mandatory injunction sought for. Again, no special circumstances have been made out for me to grant the mandatory injunction sought for. It has also to be borne in mind that to grant the injunction would mean giving the whole relief it has claimed in the action, and that is discouraged.

Finally, this would be followed by the case of *Shamsudin bin Shaik Jamaludin v. Kenwood Electronics Technologies (M) Sdn Bhd (formerly known as Trio-Kenwood Electronics Engineering (M) Sdn Bhd)* [1999] 8 CLJ 544, where I had extensively set out the law pertaining to an interlocutory mandatory injunction and, for this exercise, I need only to refer to pp. 559 to 561 of the report where I had said:

I cannot help but observe that in cases where the parties sought for an interlocutory mandatory injunctions, the principles enunciated in *American Cyanamid* have not been followed and at the most it was referred to in passing only. In my judgment, the conditions to be fulfilled before an interlocutory mandatory order is to be granted may be listed as follows:

(1) The applicant must prove by affidavit evidence that his application is an exceptional and extremely rare case which merits the order prayed for.

(2) The applicant must show that his case is clear and one which the court thinks ought to be decided at once in his favour.

(3) The applicant must show a clear case for relief or a high degree of assurance that the injunction, if granted, would rightly be granted.

and this list is not exhaustive for it may expand from time to time as the years go by. Perhaps it would be wise to refer to the decision of Lord Upjohn in the case of *Redland Bricks Ltd v. Morris & Anor* [1970] AC 652; [1969] 2 All ER 576 where his Lordship in brilliant style laid down the principles governing the grant of a mandatory injunction. This was what his Lordship said ([1970] AC 652 at pp. 665 to 667, [1969] 2 All ER 576 at pp. 579 to 581):

Isenberg v. East India House Estate Co Ltd [1863] 3 De GJ & S 263 and *Durell v. Pritchard* [1865] 1 Ch App 244 have laid down some basic principles, and your Lordships have been referred to some other cases which have been helpful. The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be 'as of course.' Every case must depend essentially on its own particular circumstances. Any general principles for its application can only be laid down in the most general terms:

(1) A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future. As Lord Dunedin said in *AG for the Dominion of Canada v. Ritchie Contracting and Supply Co Ltd* [1919] AC 999 at p 1005, it is not sufficient to say 'timeo'. It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.

(2) Damages will not be a sufficient or adequate remedy if such damage does happen. This is only the application of a general principle of equity; it has nothing to do with Lord Cairns' Act ie, the Chancery Amendment Act 1858 or *Meux's* case [1895] 1 Ch 287; [1891-94] All ER Rep 838.

(3) Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act the question of the cost to the defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account:

(a) where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the *status quo* even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff. As illustrative of this see *Woodhouse v. Newry Navigation Co* [1898] 1 IR 161;

(b) but where the defendant has acted reasonably, although in the event wrongly, the cost remedying by positive action his earlier activities is most important for two reasons. First, because no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only on a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur the plaintiff is in no way prejudiced for he has his action at law and all his consequential remedies in equity.

So the amount to be expended under a mandatory order by the defendant must be balanced with these considerations in mind against the anticipated possible damage to the plaintiff and if, on such balance, it seems unreasonable to inflict such expenditure on one who for this purpose is no more than a potential wrongdoer then the court must exercise its jurisdiction accordingly. Of course, the court does not have to order such works as on the evidence before it will remedy the wrong but may think it proper to impose on the defendant the

obligation of doing certain works which may on expert opinion merely lessen the likelihood of any further injury to the plaintiff's land. Sargant J pointed this out in effect in the celebrated '*Moving Mountain'* case, *Kennard v. Cory Bros & Co Ltd* [1922] 1 Ch 265 at pp 274, 275 (his judgment was affirmed in the Court of Appeal [1922] 2 Ch 1).

(4) If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.

This has been well settled for a long time and I regret that I cannot agree with Danckwerts LJ ([1967] 3 All ER at p. 5; [1967] 1 WLR at pp. 973. 974), that the observations of Joyce J, in *Attorney-General v. Staffordshire County Council* [1905] 1 Ch 336, pp. 342, 343 have not been followed in practice. My experience has been quite the opposite. There may be some cases where, to revert to the simple illustration I gave earlier, the defendant can be ordered 'to restore the right of way to its former condition.' This is so simple as to require no further elucidation in the court order. But in anything more complicated the court must in fairness to the defendant tell him what he has to do, though it may well be by reference to plans prepared by some surveyor, as pointed out by Sargant J, [1922] 1 Ch at pp. 274, 275 in the passage in the *'Moving Mountain'* case to which I have already referred. The principle is summed up by Maugham LJ, in *Fishenden v. Higgs and Hill Ltd* [1935] All ER Rep 435 at p. 450; 153 LT 128, 142:

> I should like to observe, in the first place, that I think a mandatory injunction, except in very exceptional circumstances, ought to be granted in such terms that the person against whom it is granted ought to know exactly what he has to do.

My Lords I shall apply these principles or conditions to this case, and I can do so very shortly.

So much for the law.

At the end of the day, all these authorities serve as mere guidelines and I must still exercise my discretion whether to grant the prayers sought for in encl. 15. In my judgment, the plaintiff had not succeeded in showing an extremely or unusually strong case that would warrant the issue of a mandatory injunction. From the tenor of the submissions by the learned counsel for the plaintiff, I was able to discern two main reasons being advanced in an attempt to convince me to order a mandatory injunction, namely:

(1) that the first defendant is an established educational centre; and

(2) it would be unusual for the first defendant to have a change of heart at the last minute.

But, with respect, these two reasons failed to come up to the standards as set out by me in the case of *Shamsudin bin Shaik Jamaludin v. Kenwood Electronics Technologies (M) Sdn Bhd (formerly known as Trio-Kenwood Electronics Engineering (M) Sdn Bhd) (supra)*. Moreover, the issue was not whether the first defendant had a change of heart but rather whether the first defendant had the legal capacity to enter into the said agreement bearing in mind that the first defendant was not a legal entity. In my judgment, the agreement between the plaintiff and the first defendant was *void ab initio*. The first defendant was not a legal entity and had no legal capacity to enter into the said agreement. Now, as far as the second defendant was concerned, it was, as alluded to earlier, never a party to the said agreement. That being the case, the second defendant was not empowered by the said Order to enforce the said agreement; to do so would be to contravene the provisions of the said Order. It follows therefore, as the night the day, that whatever actions purported to be taken by the second defendant in compliance with the said agreement must be regarded and construed as *ultra vires* and void.

Are Damages An Adequate Remedy?

For this exercise, I need to refer to the decision of Hashim Yeop A Sani CJ (Malaya) in the case of *Associated Tractors Sdn Bhd v. Chan Boon Heng & Anor* [1990] 2 CLJ 157; ([1990] 1 CLJ (Rep) 30) SC when his Lordship, in the course of delivering the judgment of the then Supreme Court, aptly said at p. 158 (at p. 32) of the report:

> But it would seem quite clear that the most important factor to consider as a matter of principle is the question of whether *in lieu* of the injunction damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the court acts upon the principle of preventing irreparable damage. As Lindley LJ said in *London & Blackwell Rly Co v. Cross* [1886] 31 Ch D 354 at p. 369:
>
> > The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy.

and flowing from it, I must therefore avoid from doing "irreparable damage" to either one of the parties. In regard to the position of the defendants, the consequences of an interlocutory mandatory injunction would be disastrous. Enclosure 15 required the first defendant to do something which it did not have the capacity to perform while the second defendant was required to do an act which was *ultra vires* the said Order. On the facts and the law, it would be highly unconscionable for this court to grant encl. 15.

Undaunted, it was argued on behalf of the plaintiff that this was an unusual case and damages would not be an adequate remedy. The plaintiff cited the following reasons:

(1) grave inconvenience caused to the China students;

(2) loss of reputation of the country; and

(3) loss of reputation to the plaintiff.

and submitted that these cannot be adequately compensated with damages.

Submitting to the contrary, the learned counsel for the second defendant argued that damages would be an adequate remedy as there was nothing unusual about this case. It was submitted that this was a straightforward case which involved a claim based on a contract. It was also submitted that the main issue before this court was whether the said agreement was void and/or *ultra vires*.

In regard to the allegations that the defendants were immoral and uncivilised in rejecting the foreign students, the second defendant submitted through its learned counsel that there was neither any form of discrimination on the part of the defendants nor were there any immoral acts as alleged. It was reiterated that the laws in this country provided for specific benefits to the Bumiputeras. It was a right enshrined in the Federal Constitution.

On the facts and the law, I entirely agreed with the submissions of the learned counsel for the second defendant. This was certainly not a case where the defendants have a choice and consciously chose to reject the foreign students. This was, in fact, the case where the hands of the second defendant was tied by the provisions of the said Act and the said Order. I would certainly answer the question, as posed, in the positive. In my judgment, damages would be an adequate remedy.

Undertaking As To Damages

A submission was made to the effect that the plaintiff must show evidence as to their ability to pay damages in the event the interlocutory mandatory injunction was wrongly granted. Here, it was strenuously argued that the plaintiff had not shown that they were able to pay the necessary damages. These submissions were rightly made and they had merits. Indeed if the interlocutory mandatory injunction was later found to be wrongly granted, the effects on the defendants would be far reaching in view of the nature of the said agreement. Shankar J (as he then was) in *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 CLJ 157; ([1989] 1 CLJ (Rep) 386) emphasised the importance of the applicant to show that he was able to pay damages should the injunction be found to be wrongly granted. At pp. 179 to 180 (at pp. 409-410) of the report, his Lordship Shankar J (as he then was) had this to say:

> In the light of the material before me I was satisfied that the undertaking as to damages given by the first plaintiff was a barren one because although challenged, he had not responded with any evidence of means. The defendants' evidence was that the delay resulting from the *ex parte* injunction had coincided with a drastic fall in values in the property market which they put at about $20 million. There is no evidence before me that the market had bottomed out. In this state of affairs it seemed to me that it would have been an exercise in futility for the assistant registrar to embark upon an inquiry as to damages if the plaintiffs were in no position to satisfy them.
>
> If they were, then the issue would have arisen as to whether they should pay these damages before the conclusion of the trial or whether they should merely give security for their payment in any event. Once again, unless there was some evidence of means the inquiry would have been an exercise in futility.
>
> A bare undertaking as to damages may be 'usual' as to form, but useless as to content unless the plaintiffs are worth powder and shot. I therefore hold it to be the right of the defendants to be told what the undertaking is worth in real terms.

What is the real purpose of an undertaking as to damages? It is simply to vest the court with the jurisdiction to make an appropriate order to recompense the loss suffered by the party who was restrained when it is subsequently established that the applicant was not entitled, in the first place, to the injunction. It is always possible that a wrong decision would be made at the interlocutory stage. Indeed this fear was also voiced by Lord Diplock in the *American Cyanamid* case [1975] 1 All ER 504 at p. 509 a:

> ... when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time *ex hypothesi* the existence of the right or violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.

To me, an undertaking as to damages must be given because if the person is wrongly enjoined he will hardly have any recourse against the applicant (*Attorney-General v. Albany Hotel Company* [1896] 2 Ch 696 at p. 699).

In reply to the second defendant's submissions that there was insufficient undertaking given by the plaintiff, the case of *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 was cited and it was pointed out that the plaintiff here may win damages at the trial and the damages awarded would constitute assets available to meet the liability on the undertaking. Edgar Joseph Jr J (as he then was) in delivering the judgment of the High Court in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors (supra)* sets out the law in these apt words (see p. 100 of the report):

I must next deal with the sufficiency of the plaintiffs' undertaking as to damages. It is true that an undertaking by a plaintiff as to damages ought to be given on every interlocutory injunction, though not where the order is in the nature of a final order: *Fenner v. Wilson* [1893] 2 Ch 656; and except under special circumstances effect ought to be given to it (per James LJ in *Graham v. Campbell* [1878] 7 Ch D 490). See also note by Jessel MR in *Newcomen v. Coulson* (1878) 7 Ch D 764.

This requirement applies even if the plaintiff has no assets and is legally aided: *Allen v. Jambo Holdings Ltd* [1980] 2 All ER 502. It is true, that perhaps, in such circumstances the undertaking is an empty shell and should not therefore be demanded since the maxim is that equity does not act in vain. But the response to this argument is that such a plaintiff may win damages at the trial and yet may have wrongly obtained an interlocutory injunction as in *Barclays Bank Ltd v. Rosenberg* (Financial Times, 12 June 1985). In such an eventuality, the damages awarded would constitute assets available to meet the liability on the undertaking.

In any event, the court will not generally deny a plaintiff an interlocutory injunction to which he would otherwise be entitled simply on the ground that his cross-undertaking in damages would be of limited or of no value. So, for example, in *Allen v. Jambo Holdings Ltd* [1980] 2 All ER 502 the Court of Appeal held, when granting a Mareva injunction, that a cross undertaking was acceptable from the plaintiffs although he was legally aided. The rationale behind this was that questions of financial ability ought not to affect the position in regard to what is the essential justice of the case.

That was an excellent exposition of the law. But in the context of the present case, the plaintiff was very unlikely to succeed at the hearing because the said agreement was void and/or *ultra vires* and, consequently, the plaintiff will certainly not receive any damages which may "constitute assets available to meet the liability on the undertaking."

The plaintiff too heavily relied on the case of *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No: 4)* [1998] 4 CLJ Supp 319 to argue that the court will not deny the poor plaintiff an interlocutory injunction if the circumstances warrant it. It was also argued that there was no affidavit evidence emanating from the defendants to show the financial status of the plaintiff in the present case. By way of a rebuttal, the second defendant rightly pointed out that in *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No: 4) (supra)*, there was evidence that the second plaintiff had disclosed that it was worth RM80 million and it was because of that disclosure that the court there held that the burden then fell on the defendants to show that the financial status of the second plaintiff by way of an affidavit evidence was, in fact, insufficient as an undertaking. Here, in the present case, the plaintiff had not shown that it was capable of paying the damages should

this court find that the interlocutory mandatory injunction was wrongly granted. Here too if the interlocutory mandatory injunction was wrongly granted, the consequences would be far reaching and it cannot be adequately compensated by damages.

A Truly Valid Defence

For fear of repetition, I must at once say that a valid defence had been raised. As I said, the first defendant had no legal entity and, consequently, had no legal capacity to enter into a valid and binding contract with any party including the plaintiff. On the other hand, the second defendant's actions and/or omissions were limited and entirely circumscribed by the said Order. The second defendant cannot, in law, act outside the scope of the powers conferred by the said Order.

Notwithstanding all these, the plaintiff still held onto the notions that the provisions of the said agreement have given the first defendant the power to enter into the said agreement and the defendants cannot now deny the effect of the said agreement. Two authorities were cited by the plaintiff in order to bolster its submissions. The first was the case of *Syed Aman Syed Hassan v. MARA Institute of Technology* [1993] 1 CLJ 228 HC; and the second case was that of *National Union Of Teachers In Independent Schools, West Malaysia v. Han Chiang High School, Penang* [1989] 1 CLJ 1091; [1989] 2 CLJ (Rep) 160. With respect, the plaintiff had misconstrued the correct legal position. How could the alleged power or authority be given to the first defendant under the said agreement when the first defendant was not an existing legal entity? How could the first defendant enter into the said agreement when it had no legal capacity to do so? These were certainly germane questions to be posed.

I pause here for a moment. The cases of *Syed Aman Syed Hassan (supra)* and *Han Chiang High School (supra)* can easily be distinguished.

In *Syed Aman Syed Hassan (supra)*, the action was commenced against the defendant, MARA Institute of Technology, an institution of higher learning with a separate legal entity. The defendant was established under the Institut Teknologi MARA Act 1976 (Act 173) (hereinafter referred to as the "ITM Act") and under s. 4A(1)(a) thereto there are provisions for the defendant to "enter into equity participation, partnership, joint venture, undertaking or any other form of co-operation or arrangement in association, or otherwise, with:

(i) an enterprise, a company, a private undertaking or a syndicate of persons constituted for the carrying on of business in Malaysia or elsewhere;

(ii) the Federal Government or any State Government;

(iii) a public body or authority;

(iv) a commission; or

(v) a person."

It would thus be apparent that under the ITM Act, the powers of the defendant were quite wide and exercisable by the defendant, namely, MARA Institute of Technology. Whereas in the present case at hand, neither the said Act nor the said Order gave the defendants the same powers like the defendant in *Syed Aman Syed Hassan (supra)* to enter into the said agreement.

I will now examine the case of *Han Chiang High School (supra)*. That was a case which revolved on an industrial relation dispute. The fact that an action was commenced against a school cannot be used as a leverage to argue that the same would also apply to the defendants in the present case. It was not the stand of the second defendant, in the present case, that the plaintiff's claim was bad because it instituted proceedings against an institution of higher learning. Rather the stand of the second defendant was that the first defendant was not a legal entity and hence had no legal capacity to enter into the said agreement. Furthermore, the second defendant here was not empowered under the said Act or the said Order to enter into the said agreement.

Not to be outwitted, the plaintiff referred to the case of *Malaya Borneo Building Society Ltd v. M. Ramachandran* [1959] 25 MLJ 182 CA and argued that when the first defendant entered into the said agreement with the plaintiff, it intended to be bound by its terms and that the parties had intended to carry out the contract and to abide by its terms legally. But, with respect, that case was way off tangent and it was inapplicable to the facts of the present case. Here, the issue of whether the defendants intended to be bound by the said agreement did not arise at all.

The plaintiff also relied on the case of *Banque Nasionale De Paris v. Wuan Swee May & Anor* [2000] 4 CLJ 387 and argued that the policies of the country, her moral values and the law should be interpreted in favour of the China students. It was argued that since there was no express provision in excluding the China students from pursuing their studies with the first defendant, the China students should not be denied their noble intentions of furthering their studies and gaining more knowledge. In short, using the case of *Banque Nasionale De Paris (supra)*, the plaintiff was saying that this court should take into account the public policies of this country and her moral values in order to arrive at a decision in favour of the China students. Now, briefly the facts in *Banque Nasionale De Paris (supra*) may be stated as follows. There the first defendant, a Malaysian citizen, had obtained a loan from the plaintiff, a bank in Singapore. The plaintiff filed two suits in

Singapore. After a full trial, judgment was given against the defendant. The defendant filed an application for an order that the order registering the judgment of the Singapore High Court against her be set aside on the ground that the enforcement of the judgment would be contrary to public policy in Malaysia pursuant to s. 5 of the Reciprocal Enforcement of Judgment Act 1958. The court considered the issues of public policy and illegality. Here before me, the present case, on its facts, were poles apart from that of *Banque Nasionale De Paris (supra)*. Here unlike there, art. 153 of the Federal Constitution was put in the forefront.

This was the distinguishing feature of this case with that of *Banque Nasionale De Paris (supra)*.

Next, the case of *Ho Shee Jan v. Stephens Properties Sdn. Bhd.* [1986] 2 MLJ 43 was relied upon by the plaintiff to argue that the second defendant should not "blow hot and cold" at its whims and fancies. That was a case in regard to the transfer of shares and the court applied the doctrine of fair play in commercial conduct. Here, no shares were involved and the second defendant did not have a choice whether to accept the foreign students or not because the powers of the second defendant were curtailed and circumscribed by the said Act and the said Order. Moreover, as I said earlier, the second defendant was not even a party to the said agreement.

Conclusion

In my judgment, for the reasons adumbrated above, this was certainly not an exceptional and rare case to grant an interlocutory mandatory injunction. I must therefore dismiss the plaintiff's application in encl. 15 with costs.

Addendum

As an *amicus curiae*, Mr. Oommen Koshy had done a marvellous job for the first defendant. He has assisted the court tremendously. The future augurs well for an *amicus curiae* as judicial recognition of its role solidifies. To me, an *amicus* may aid and assist the court by providing services necessary for the court to reach a proper conclusion.